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In The

Supreme Court of the United States

October Term, 1994

COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES,

Petitioner,

v.

GEORGE W. HENGLEIN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether acts and events which occurred both before and subsequent to the enactment of ERISA should be considered in accordance with ERISA's standards and requirements where the petitioner failed to take any effective action to terminate plans providing employee benefits prior to ERISA's enactment, and continued to engage, subsequent to ERISA's enactment and until 1982, in a course of conduct intended to grossly mislead the Employees concerning the benefits they would be entitled to in the event of a plant shutdown.

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COUNTER STATEMENT OF JURISDICTION

The Petition seeks a review of the judgment of the Court of Appeals for the Third Circuit entered September 21, 1994, in *George W. Henglein, et al. v. Colt Industries Operating Corp. Informal Plan,* a judgment which lacks finality. The Court is therefore without jurisdiction to review that judgment.

COUNTER STATEMENT OF THE CASE

Colt has selectively arranged – or omitted – the facts with the objective of establishing that the pre-ERISA conduct of Colt was so reasonable and just as to insure that the application of pre-ERISA state law to that conduct would result in a clear stamp of approval, and a declaration that its undisclosed efforts in 1969 and 1972 to rescind pre-existing plant shutdown plans for salaried employees were fully effective. Upon this foundation rests its essential claim that the Third Circuit improperly disregarded that body of state law and unfairly applied retroactively ERISA concepts that Colt could not have anticipated. Tears are not in order.

The 1968 Informal Plan (A. 124) was a program designed to provide benefits in the form of the earned portion of an unreduced Thirty Year Retirement, paid up life insurance and monthly supplements, to long term salaried employees upon the shutdown of a department or plant and was put into effect by Crucible on August 28, 1968 shortly before the takeover of Crucible by Colt in mid October, 1968. The employees were informed of the 1968 Informal Plan through the September 12, 1968 Memorandum of the then President of Crucible, John Lobb, addressed to "Salaried Non-Union Employees" (A. 129) and through the September 9, 1968 Memorandum of B. H. Francis, the corporate Director of Employee Benefits (A. 124).

The Proxy Statement of 1968 (referred to and misquoted at A. 122) under the heading "Employee Benefit

Plans" provided, with respect to the existing pension benefit plans of Crucible, that:

> Benefits under the various employee benefit, retirement and pension plans of Crucible will not be affected by the consolidation except that (a) . . . (b) the other Crucible benefit plans, including its incentive compensation plan and the Crucible Fund, will be amended to the extent necessary and,appropriate to make such plans applicable to the employees and operations of the new subsidiary which will conduct the Crucible business after the consolidation. (At 6).

The Proxy Statement, at page 7, provided, with respect to the existing benefit plans of Colt, as follows:

> Benefits under the various employee benefit, retirement and pension plans of Colt will not be affected by the consolidation, but will be assumed by New Colt and will be continued in effect in accordance with their respective provisions, unless and until changed pursuant to the amendment provisions of such plans.

The differences between the Proxy Statement paragraphs quoted above are substantial and significant: no restrictions were placed upon the modification or elimination of existing Colt benefit plans while existing *Crucible* retirement and pension plans were to be "amended to the extent necessary or appropriate" in order to serve a clearly defined purpose: "to make such plans applicable to the employees and operations of the new subsidiary. . . . "

Colt misrepresented to the district court and the Third Circuit in *Henglein* II and *Henglein* III the above Proxy Statement provisions by stating – in its Findings of Fact and Conclusions of Law (A. 122) and at page 37 of its May 7, 1994 appellate brief – that the Proxy Statement paragraph dealing with Colt benefit plans, actually

applied to Crucible benefit plans and by thereafter arguing that " . . . Colt has as much latitude as Crucible to modify or eliminate pre-existing benefit plans."

Colt so acted in its *Henglein* III brief even though the Employees, in their reply brief of August, 1993 in *Henglein* II (at pages 17-19) pointed out the misrepresentation. The Appendix submitted to this Court along with Colt's certiorari Petition again sets forth verbatim the very same misrepresentation without any corrective comment in the Petition.

Within two months of the stockholder meetings of October 1968 at which the Colt takeover of Crucible was approved, Colt proceeded to dismantle the 1968 Informal Plan and to deny its benefits to eligible employees without explanation. On December 18, 1968, E. A. March, a Colt Group Vice President, directed that no further commitments be made to any employee for benefits under the Plan. (A. 150). On December 31, 1968, B. H. Francis noted in a Memorandum that all benefit requests under the Informal Plan ". . . must be submitted to Mr. Wm. Ford, general counsel, Colt Industries, for approval" (A. 150). even though the Informal Plan expressly provided that the Retirement Board of the formal pension plan was to act as a board of review to authorize benefits. (Referred to but omitted at A. 112).

On January 2, 1969, three employees were peremptorily denied benefits (A. 153). One of the three, Arnold Stewart, protested that denial, filed suit and was eventually awarded benefits under the 1968 Informal Plan. (At 154, 155). Employees at Crucible's Spaulding facility, with from 26 and 27 years of service respectively, who were familiar with the terms of the 1968 Plan and the Lobb Memo of September 12, 1968, requested Informal Plan benefits in 1973. Their requests were denied through letters stating that the Plan had been terminated "during March of 1969 (A. 157) or had been "terminated on December 1, 1972." (A. 157).

At no time did Colt provide notice to the Employees of the 1969 Hardship Retirement Guidelines (the 1969 Informal Plan) which purported to terminate the 1968 Informal Plan or of the December 1, 1972 Resolution of the Board of Directors (A. 135) which purported to terminate the 1969 Informal Plan. Roy Barr, Vice President of Personnel, and A. C. Hilton, Colt Group Vice President, admitted in their depositions that the employees were not informed that they were not protected by plant shutdown benefit plans. Barr's testimony was as follows:

> Q. I ask you again, at any time subsequent to the negotiations of that contract in 1980 with the U.S.W., did anyone give notice to the salaried employees that they should not anticipate being accorded plant shutdown benefits described in that contract?
>
> A. We wouldn't do that. We would never – who would do that? Who is going to give a notice that you're not going to get something? You know, when you talk about benefits, you know, like in booklets, here is your benefit program. You don't have meetings or send out documents saying you are not going to get something. I don't understand the question. If that's the question, I just don't comprehend it. Would I tell somebody they are not going to get something? I certainly hope I wouldn't do that. (Ex. 18 at 174).

The above testimony by Barr reflects compliance with his superiors' instructions. With respect to the attempted nullification of the Informal Plans, March had told him: "I don't want anybody to talk about it." (Ex. 18 at 115). Hilton testified as follows:

> If there were a plan that applied to a plant shutdown situation and we had no plant shutdown and we eliminated the plan, we would not

> run out and say we had no plan. It is not something in people's mind. We would not necessarily say that it is no longer there. . . . I would say in that situation we would not, which was a stand-by kind of thing. It is like we decided we do not need that fire extinguisher at the end of the hall. We would not run out and tell everybody. It wasn't used and there was no longer a need for it. We would not tell everybody we no longer have that fire extinguisher. (Ex. 19 at 24, 25).

As the Court of Appeals declared in *Henglein* III (A. 12). Colt's efforts to nullify the Informal Plan of 1968 were "surreptitious." Notice of this attempt was deliberately withheld because of the consequences of disclosure as described by Schake (Vol. 1, at 15, 16) and others who testified that disclosure of the fact that salaried employees would receive no benefits in the event of a shutdown, while union employees would receive generous benefits, would have eliminated union employees as a recruitment source for salaried positions, a recruiting source essential to the continued productivity of the Midland mill. Disclosure of Colt's intentions "would have caused a near war with the personnel people who happened to bring it up." (Whitehead, Tr. Vol. 9 at 54).

In short, Colt, in the negotiations leading to its acquisition of Crucible, committed itself to continue in effect pre-existing Crucible pension plans, including the then promulgated 1968 Informal Plan; quickly thereafter proceeded to deny the benefits of that Plan to eligible long-term employees terminated by reason of department shutdowns, and "surreptitiously" to use the term chosen by the Court of Appeals in *Henglein* III, moved to revoke the 1968 Plan and to replace it with the 1969 Plan which vested unbounded discretion in the Colt administrators.

To argue that pre-ERISA state law would have regarded such conduct as beyond reproach, requires the firm belief that no concept of fair play or good faith

governed the conduct of employers in the course of administering employee benefits prior to ERISA. Mr. Powderly indeed asserted precisely that position at page 19 of his August 17, 1990 trial brief. (*See*, ARGUMENT II).

In its Statement of the Case, Colt chose to say nothing of its Proxy Statement commitment although its Appendix, at page 122, repeats verbatim the totally false claim that the Proxy Statement paragraph dealing with *Colt* benefit plans applied to pre-existing Crucible plans. Colt thus elected to add the Supreme Court to the list of courts to which it was prepared to submit an outright fabrication.

The district court did rule, as Colt alleges at page 9, that the 1969 Plan replaced the preconsolidation 1968 Plan. But, as the Court of Appeals repeatedly noted, the 1969 Plan was never disclosed to the Employees and, since the Proxy Statement assured the continued existence of the 1968 Plan, the 1969 Plan could not be given the effect of altering in any way the benefits provided by the 1968 Plan, or through broadening the extent of the discretion provided for by the 1968 Plan. It was totally illogical for the district court to have given the 1969 Plan a full superseding effect and to then point to its totally unfettered discretionary terms as the basis for holding that it had no legal significance under Pennsylvania law. The district court in effect ruled that despite the Proxy Statement commitment, Colt, through its surreptitious issuance of the 1969 Plan, totally destroyed vitally significant protections that had been promised to the salaried employees. Colt is now asking the Supreme Court to rule that such irresponsible reasoning by the district court be given full effect.

The district court also chose to make no mention of the Proxy Statement by Colt. Indeed, instead of noting that existing pension plans of Crucible were not to be affected by the merger, the district court concluded, for unknown reasons, that:

> In 1969, as a result of the merger, Crucible Inc., terminated the 1968 Informal Plan. (A. 26).

The Petition asserts, at page 9, that:

> The district court reasoned that the same unfettered discretion retained by the employer in the 1969 version of the policy . . . was essentially the same as prior versions of the document. . . .

The district court reviewed only the terms of the 1969 document at the pages of its opinion to which reference is made. The 1968 Plan was straightforward in its terms, *e.g.*, it stated that "to be eligible" for the 20-30 Year Retirement "an employee must be less than 65 years of age and must have more than 20 and less than 30 years of service with the company." (Ex. 4 at 3). In contrast, the Colt authored 1969 document stresses unbounded freedom on Colt's part to grant or withhold benefits for *any* reason or *no* reason. A typical statement in the document was that:

> NOTE that employees do not have a *right* to these benefits. Information concerning these benefits should be restricted as far as possible to management. Employees should *not* be told that they can elect these benefits. (emphasis in original). (A 133).

A SUMMARY OF THE ARGUMENT

The application of ERISA standards to pre-ERISA conduct was appropriate since the most significant elements of that conduct – surreptitious attempts to rescind preexisting plant shutdown benefit plans for salaried employees in violation of a Proxy Statement commitment by the employer – did not become known to the affected employees until long after ERISA's enactment, and because the employer continued, during the seven year period subsequent to ERISA, to violate its fiduciary obligations toward the Employees both through dishonest

oral representations and by a failure to affirmatively disclose information known to it but unknown to the Employees: *i.e.*, that plant shutdown benefits, contrary to standard practice, were not in place for them while available to union employees.

Such action by the Third Circuit did not result in unfairness to the employer since pre-existing state law would also have condemned the employer's conduct and caused its undisclosed efforts to rescind to be ineffective.

The significance accorded by the Third Circuit to evidence of false oral representations by the employer was consistent with the fundamental objectives of ERISA.

Colt violated the law of the case doctrine by repeatedly challenging – in *Henglein* II, in *Henglein* III and by its pending petition – the rulings in *Henglein* I. *Henglein* III is not a final ruling determining entitlement and is therefore not reviewable.

ARGUMENT

I. THE THIRD CIRCUIT CORRECTLY APPLIED ERISA STANDARDS TO COLT'S CONDUCT PRIOR TO 1975.

The petition argues that the Third Circuit's analysis requires that once a claim for benefits is made after ERISA's effective date, all events must be interpreted pursuant to ERISA's requirements "even if the underlying events occurred before ERISA's effective date and the effect of such an interpretation is to impermissibly expand the court's subject matter jurisdiction over the claim." (At 15). It is thus contended that all "underlying events occurred before" ERISA's enactment and that pre-ERISA state law, and not ERISA, should be applied to such events. But Colt, in earlier briefs before the Third Circuit in this litigation, argued that the exact opposite was true. Colt's September 30, 1985 appellate brief in *Schake v. Colt Industries, supra* 85-3381, declared at page 18, that:

> Similarly, "acts or omissions" relating to the employees cause of action occurred if at all *after* January 1, 1975. . . .
> (emphasis in original).

That same brief asserted, at page 17, that although the "Employees' briefs suggest that State law applies . . . there can be no serious question that ERISA does govern their claims." At page 18, it was insisted that "the Employees' State law claims . . . are pre-empted by ERISA and of no legal effect." It is further asserted, at page 27, that the Employees were ineligible for Informal Plan benefits because "the operation of any state law concerning such rights . . . had been pre-empted by ERISA."

Six years later, Colt's September 23, 1991 appellate brief in *Henglein* I again asserted that: "As of 1982, ERISA was the governing law and all previously applicable state law had been preempted" (At 20) and that "it is, irrelevant whether or not the informal policy was an offer under state contract law." (At 29).

The scope of ERISA's pre-emption, if it has changed at all, has increased rather than narrowed since the 1985-1992 period. Colt cannot point to that factor as being responsible for its change of position and, of course, whatever events took place prior to 1975 cannot be effectively altered by changes in Colt's litigation strategies.

Colt's earlier position – that all significant acts occurred after 1975 – and its Present Position – that all significant acts occurred Prior to 1975 – are both incorrect. Significant events occurred both prior and subsequent to 1975. So far as the Employees knew, the 1968 Informal Plan and the 1973 Total Income Protection Plan were the only pre-ERISA events directly indicative of the existence of plant shutdown protection plans applicable to them – the 1968 Plan explicitly in its terms and the 1973 Total Income Protection Plan implicitly as in its conclusion that:

> These changes and additions in your benefit program have been designed to provide you

> and your dependents with Total Income Protection. . . . (A. 160).

The Proxy Statement was also significant since it contained a clear assurance by Colt that existing pension benefit plans at Crucible would continue in effect.

Before 1982, the Employees knew nothing of the 1969 Plan which purported to terminate the 1968 Plan or of the 1972 Board of Directors Resolution which purported to terminate all Informal Plans.

ERISA § 514 does not *require* the application of pre-ERISA state law to pre-ERISA conduct. By omitting such state law from the scope of its pre-emption provision, it makes that law available for application when its use promotes fairness for all concerned parties. As the First Circuit stated in *Quinn v. Country Club Soda,* 639 F.2d 838 (1st Cir. 1981), the section was designed:

> . . . to *permit* courts to apply state law, even if the cause of action accrued after January 1, 1975, in cases where that result most fairly accommodates the interest of all affected parties – the beneficiaries, participants, and fiduciaries of and contributors to an ERISA trust. (At 841). (emphasis added).

The Petition, at page 2, complains of a "retroactive application of the provisions of ERISA to events and acts finally concluded under the then applicable state law, prior to the enactment of ERISA. . . . " Thus, Colt again took a position contrary to its earlier statements. Its June, 1988 brief in the district court argued at great length (*See,* pp. 9, 11, 12, 30, 32, 33, 34, 38 and 39) that it had provided notice by inaction that the Informal Plans no longer existed, *i.e.,* by not granting Informal Plan benefits during the period 1972 to 1982 when several departments were closed. It contended that the Employees thus had abundant reason to know that plant shutdown benefits were not in place for them. Colt's July 8, 1988 brief in the district court, at page 58, asserted the same claim of notice by "inaction." The claim of notice by "inaction"

was finally abandoned after the passage of one and one-half years following Colt's response to the Employees' Interrogatory No. 11 (Ex. 22) which made it clear that none of the employees terminated in the course of department shutdowns in the 1972-1982 period had sufficient years of service to qualify for benefits under either of the two Informal Plans.

Post-1975 practices and events material to the Employees' claims include:

(1) The consistent practice of maintaining benefits for salaried employees which in all cases were identical to or equal in value to union-won benefits with the sole exception of plant shutdown benefits – an exception that the salaried employees would not learn of until the 1982 shutdown.

(2) The Employees' ignorance of this single exception was attributable solely to the concealment by Colt, from 1975 to 1982 (as well as prior to 1975) of the fact that it had firmly and irrevocably determined that in the event of a shutdown, zero benefits would be awarded to salaried employees. Colt's argument that it withheld notice from the Employees of its intention to award them zero benefits upon a plant shutdown because "such a notice would be unnecessary or confusing" (A. 144) is palpably absurd. The operation of the Crucible mill was vitally dependent upon the recruiting of union employees to salaried positions and the retention of skilled salaried employees who, with knowledge of the danger of a plant shutdown and the absence of benefits in such an event, would have looked elsewhere for secure employment. (A. 14, n. 5).

Henglein's testimony was representative of the Employees as a group. If he had learned of the attempt to rescind the Informal Plan, "I would have suspected that . . . they indeed were going to shut down the plant." (Tr. Vol. 1 at 122, 123).

(3) On August 1, 1976, Colt issued its Policy and Procedure 74.1. That document set forth the assurance that Colt would maintain, in the case of "EMPLOYEE BENEFITS (INSURANCE AND PENSIONS)" " . . . a good level of employee benefits consistent with general industry wide practices. . . . " (A. 145). The Employees testified consistently that the practice in the steel industry, with respect to plant shutdown benefits and all other benefits, was to provide benefits to salaried employees equal in value to such benefits won by union employees. Illustrative of this practice at Crucible was the E. A. March memorandum of March 12, 1971 (A. 138) in which he described a situation in which salaried employees "would receive a greater pension upon retiring if they returned to the bargaining unit upon retirement" as a "manifest inequity."

(4) The continued recruiting of union employees for salaried positions – who were assured by their recruiters (who believed they were telling the truth) that they were losing no benefits and that in all cases their benefits would be equal in value to or superior to union-won benefits. The Petition asserts, at page 7, that "a relatively small percentage of the total salaried work force" was recruited from union ranks. Actually, of the 64 Employees who testified, 42 had been recruited from union ranks – 27 of the 42 *after* 1968.

Colt would have this Court believe that the 27 former union Employees, if they had been informed that by accepting offers of salaried positions they would be forfeiting plant shutdown benefit plans in place for them as union Employees, would nevertheless have gamely accepted such offers rather than hold on to their union positions for dear life. As Laneve testified, if he had been informed of the absence of plant shutdown benefits when recruited in 1978:

> . . . they would not have got me. I tell you that right now. There is no way that I would be fool

enough to give up everything I have to go on a salary job for nothing. (Tr. Vol. 3 at 163).

(5) The 64 Employees who testified consistently reported that senior Colt officials such as E. A. March, Barr and Vensel repeatedly assured them at group meetings, prior to 1975 and during the seven year period preceding the 1982 shutdown, that they were fully protected by benefits comparable to or superior to union-won benefits. The Employees also testified that they were familiar with, in varying degrees, with the plant shutdown plans in place for hourly employees.

We are dealing then, with a practice of deception on Colt's part that began a few weeks after the October 1968 takeover of Crucible and continued until shortly before the 1982 shutdown when there was still a possibility of finding a buyer interested in operating the facility as a mini-mill. The Third Circuit properly analyzed this continuous pattern of conduct under ERISA's standards. Its opinions would have been awkward indeed if they had sought to apply state law to events prior to 1975, of which the Employees had no knowledge, and ERISA to the post 1975 period at the end of which the Employees learned of Colt's attempted rescissions of 1969 and 1972. Colt's conduct was, as Judge Cardozo said of the law, a "seamless web." That web was not sundered on the day of ERISA's enactment.

II. COLT WAS SUBJECT TO FIDUCIARY RESPONSIBILITIES TO THE EMPLOYEES BOTH UNDER PRE-ERISA STATE LAW AND UNDER ERISA WHICH REQUIRED IT TO BE TRUTHFUL AND TO AFFIRMATIVELY DISCLOSE INFORMATION OF CRITICAL IMPORTANCE – THE ABSENCE OF PLANT SHUTDOWN PROTECTIONS.

State Law

If pre-ERISA State law had been applied to pre-ERISA events, would the outcome have been any different?

We are dealing with *pension* benefits, an area where State law has assured protections quite comparable to those of ERISA. *See, e.g., Levitt v. Billy Penn Corp.*, 283 A.2d 873 (Pa. Super. 1971). in which the court stated:

> Pension plan benefits are deferred compensation, not gratuities, even if the employee makes no contribution to the fund. Lowe v. Jones, 414 Pa. 466, 469, 200 A.2d 880, 881 (1964). The employee has a contractual right to enforce the plan according to its terms, and such benefits may not be denied arbitrarily. Even where words such as "absolute discretion" are used, such terms do not give the administrative body unfettered discretion. (At 875).
>
> . . . *the construction most favorable to the employee must be adopted.* (At 876). (emphasis added).
>
> Finally, appellee's interpretation of the plan is inconsistent with the idea that pension benefits are rights which an employee has earned rather than gratuities given him by his employer. This "gratuity theory" is being discarded by our courts which at the same time are constricting the area within which administrative committees may exercise their total discretion. Lowe v. Jones, supra; Russell v. Princeton Laboratories, Inc., supra; Siegel v. First Pennsylvania Banking & Trust Co., 201 F.Supp. 664 (E.D.Pa.1961); Siegel v. First Pennsylvania Banking & Trust Co., 248 F.Supp. 249 (E.D.Pa.1965). See Garner v. Girard Trust Bank et al., supra. (At 876, 877).
>
> "We cannot subscribe to the appellant's argument that the words 'full authority' are synonymous with the terms 'absolute discretion' or 'unlimited discretion'; even such terms do not give a trustee unfettered discretion in all instances." The courts can compel the trustees of a pension plan to exercise their discretion within the bounds of reasonable judgment. Garner v.

> Girard Trust Bank et al., supra; Forrish v. Kennedy, supra. (At 877).

In *Lowe v. Jones*, 200 A.2d 880 (Pa.S.Ct. 1964), the Supreme Court of Pennsylvania described pension benefits as follows:

> It is rather well established now that pensions are not gratuities but payments made as deferred compensation for services already rendered. A wage-earners pension is not something which miraculously falls to him as manna from the sky. It is the fruit of the tree which he has planted, which he has nurtured with his continuous loyal service and watered with the sweat of his years of dedicated work. (At 881, 882).

Colt insists that, despite such expressions of great concern for the protection of pensioners' rights, Pennsylvania law would have given full effect to Colt's surreptitious efforts, in violation of its Proxy Statement commitment, to do away with plans aimed at protecting the pension rights of long-term salaried employees. We will not repeat the extensive analysis set forth in *Henglein* III concerning the extent to which the Employees had been informed of the existence of the 1968 Informal Plan and will refer to it only in connection with the acknowledged doctrine that an offer of a general nature can be withdrawn only through a notice as conspicuous and as assured of receipt as the original offer.

The *Restatement (Second) of Contracts*, § 46, states as follows:

> "Where an offer is made by an advertisement in a newspaper or other general notification to the public or to a number of persons whose identity is unknown to the offeror, the offeree's power of acceptance is terminated when a notice of termination is given publicity by advertisement or other general notification equal to that given to the offer and no better means of notification is generally available."

Corbin on Contracts (Rev. Ed. 1993), § 2.21, states as follows concerning the withdrawal of a general offer:

> Thus, where a newspaper published a subscription prize contest and subsequently attempted to modify the offered terms by publication in the same paper, it was held that the purported modification, i.e., revocation and renewal on different terms, was ineffective as to participants who had not seen the modified terms, the court deemed that under all the circumstances the modification should have been personally addressed to the agents. This seems an appropriate result as the participants were not very numerous and their names and addresses were known to the offeror. (emphasis added).

Corbin also quotes, in note 6, to the same effect *Long v. Chronicle Pub. Co.*, 68 Cal.App. 171, 173, 228 P. 873, 875-76 (1924), as follows:

> "The contestants were not so numerous but that if any changes in the rules of the contest were either contemplated, or had been made by the management, the most natural thing to have been anticipated by each of the parties to the contract would have been an actual notification thereof, rather than the impersonal method of publication in the newspaper." (emphasis added).

Colt's 1985 appellate brief in *Schake*, at page 22, acknowledged that "each" of the salaried employees had received a copy of the Lobb memorandum informing them of the greatly improved Informal Plan offering employees with 20 to 30 years of service the earned portion of the Thirty Year Retirement which they had earned. Accordingly, applying both the *Restatement (Second) of Contracts* and *Corbin*, it follows that an effective rescission of the Informal Plans under state law would have required notice through a letter to each of the salaried employees – employees whose names and addresses were, of course, known to Colt.

In contrast to such requirements of state law – that the withdrawal of a general offer must be made in a manner that assures receipt by all affected – Colt took care to assure that even its senior supervisors and superintendents, who frequently recruited union employees for salaried positions, knew nothing of its intentions to nullify the Informal Plans and to award zero benefits to the salaried employees upon a shutdown event.

One employee, Arnold Stewart, who was terminated because of a department shutdown shortly after the Colt takeover, and who had the requisite 20 years of service, did act to enforce his rights under the 1968 Plan after he had been summarily denied his benefits. Stewart filed suit in state court and, in 1973, was awarded benefits under the 1968 Plan including paid-up life insurance. (A. 154-155).

The Informal Plan was also enforceable under state contract law. Colt's Proxy Statement commitment to continue in effect pre-existing Crucible retirement plans, and its actions in violation of that commitment, are reviewed in the Statement of the Case. A commitment by an acquiring company to continue in effect the existing pension benefits of the company being acquired creates third party beneficiary rights in the employees of the acquired company. The Second Circuit recognized this rule of law in *Amato v. Western Union Intern. Inc.*, 773 F.2d 1402, 1419-20 (2d Cir. 1985). Article VIII, § 8.02 of the Purchase and Sales Agreement there considered, provided that:

> . . . purchaser agrees that . . . it shall take no action to reduce existing pension or other benefits of the Company's employees.

The court held that the employees of the acquired company had third party beneficiary rights pursuant to that commitment if evidence demonstrated that they were among the employees "intended to be benefited by Agreement Article VIII, § 8.02." In the present case, there

can be no doubt that the employees of Crucible were the parties to be benefited by the commitment made by Colt.

Colt has never acknowledged that its officials – as they acted in the course of administering employee benefit plans and making representations concerning them – were obligated to act as fiduciaries. To the contrary, it argued, in appellee's trial brief of August 17, 1990, that the Informal Plan was an illusory promise not rendered enforceable by considerations of good faith. In the course of a review of the opinion in *Boase v. Lee Rubber and Tire Co.*, 437 F.2d 527 (3d Cir. 1970), Mr. Powderly asserted:

> Another problem with the *Boase* opinion is that it cites *Forrish* for the proposition that "termination in bad faith will not be supported by the courts." 437 F.2d at 532 n.12. This is neither a correct statement of Pennsylvania [sic] nor a correct statement of the holding in *Forrish. Forrish* held instead that, on the facts of that case, the *trust instrument* limited the exercise of the trustees' discretion to conform to the stated purposes of the trust. In *Forrish,* the terms of the trust instrument required the trustees to act in good faith. *Here by contrast there is no trust, no fiduciary trustee/beneficiary relationship, and no textual requirement of "good faith."* Any inference from the vague discussion in footnote 12 of *Boase* contrary to Pennsylvania's employment at will doctrine that promissory contract language is never illusory because of an implied requirement of good faith is weakened by the fact that the entire footnote is dicta. (At 19). (emphasis added and in original).

Pre-ERISA state law, in Pennsylvania (*see, Lowe v. Jones, Levitt v. Billy Penn Corp., supra*) and elsewhere, is in accord with the holdings in *Boase* and *Forrish* that employers must act in good faith in administering benefit plans.

The essence of state contract law as it related to employee benefits was declared by the court in *Diamond v. Davis*, 62 N.Y.S. 2d 181, 194 (S.Ct. 1945), with the statement that:

> Employees have the right to place reliance upon the full performance of every authorized act and plan for employee benefit and welfare . . . Every benefit . . . which in the course of fair dealing and reasonable conduct should be rightfully expected may be regarded as part . . . of the compensation payable. . . .

The Fiduciary Duties Imposed By ERISA.

During the several year period during which Colt insisted that ERISA, rather than state law, applied to pre-ERISA conduct, Colt argued that ERISA imposed no duty upon an employer to act honestly and in good faith in the course of administering employee benefit plans. In its February 14, 1989 brief in the district court, it asserted that Colt's uncommunicated, subjective intent to nullify the Informal Plans was totally dispositive of the Employees' claims. At pages 12 and 13, it asserted that:

> Whether this intent [to nullify the informal plans] was communicated to the plaintiffs is irrelevant. . . . what the plaintiffs believed or thought were existing benefit programs after the passage of ERISA is irrelevant.

Colt's March 14, 1989 brief in the district court at pages 4 and 5, claimed that even if its decision not to communicate its decision to terminate a plan was prompted by an "improper motive," its intent with respect to the plan is "the sole test for the existence of a plan to which ERISA rules would apply."

It is incredible that Colt would hope to persuade a court that its intent, whether under state law or ERISA, with respect to the provision of a benefit should be solely determinative of whether a right to that benefit existed,

even though it had not communicated notice of that intent because of an "improper motive", *i.e.*, it deliberately intended to deceive employees who with knowledge of that intent could have acted to protect themselves.

The fiduciary obligations imposed by ERISA clearly hold employers are subject to fiduciary responsibilities in administering and communicating concerning employee benefit plans, must speak truthfully, and must disclose information to the employees which is of crucial importance to them. The cases of *Rucker v. Pacific FM Inc.*, 806 F.Supp. 1453 (N.D. Cal. 1992) and *Drennan v. GMC*, 977 F.2d 246 (6th Cir. 1992), vigorously endorsing this view, were previously brought to the attention of the district court and Colt but no attempt to distinguish them was made by either.

The *Rucker* court noted that:

> The purpose of ERISA notification requirements is to protect the interests of the plan participants. *Blau*, 748 F.2d at 1352. This goal is undermined where employers, such as Pacific FM, play "hide the ball" with its employees. The burden is not on plaintiff to ask what coverages have been eliminated; that responsibility lies with defendants. 806 F.Supp. 1458, n. 8.

The Third Circuit, in *Fischer, et al., v. Philadelphia Electric Co.*, 994 F.2d 130 (3d Cir. 1993), held that the fiduciary duties to which an employer is subject in the course of administering and communicating concerning benefit plans are so extensive as to apply to the disclosure of internal decisions made with respect to the issuance of *future* plan revisions. The court endorsed the ruling of the Sixth Circuit in *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154 (6th Cir. 1988), in which the Sixth Circuit:

> . . . rejected the view that "any communications or representations made prior to such a decision were also nonfiduciary." *Id.* The Court held that "a fiduciary may not materially mislead those to

> whom the duties of loyalty and prudence described in 29 U.S.C. § 1104 are owed." *Id.* More specifically, it held that once Michigan Bell gave "serious consideration" to offering additional benefits, it was under an obligation as plan fiduciary "not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning [the offering]." (*Fischer* at 133).

The court's opinion in *Fischer* also noted that such holdings by the *Berlin* court were in accord with *Drennan, supra.*

In *Fischer,* the Third Circuit further stated:

> As a plan administrator under ERISA, however, PECO was a fiduciary and was required, among other things, "to discharge [its] duties solely in the interest of the participants and beneficiaries." (At 133, citations omitted) . . . A plan administrator may not make affirmative material misrepresentations to plan participants about changes to an employee pension benefits plan. Put simply, when a plan administrator speaks, it must be truthfully. (At 135).

In *Fischer,* the employer's representatives made oral representations to the employees that an enhanced early retirement was *not* being planned when, in fact, it was under consideration: the employees' testimony concerning such oral misrepresentations was given considerable weight. The *Fischer* case was remanded for resolution of the question of fact of whether such oral misrepresentations were material along with the ruling that:

> . . . a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. (At 135).

Colt's failure to disclose its efforts to rescind the plant shutdown benefit plans and its nondisclosure of its

intentions to provide salaried employees zero benefits upon a shutdown event would appear to have been material misrepresentations. There was indeed a substantial likelihood that they were intended to, and in fact did, mislead the Employees in making adequately informed decisions about whether either to accept offers of salaried positions as they were being recruited from the union or to continue their employment at the Colt Midland mill as salaried Employees rather than seek employment elsewhere during the early seventies when jobs in the steel industry (unlike in the eighties) were still readily available. Concerning union recruits, Barr, Vice President of Personnel, acknowledged:

> If you're saying would people take the salaried job if they thought they were going to lose money, I doubt it. (Ex. 18 at 133).

The importance of an employer's fiduciary duties to its employees was also stressed by the district court in the Eastern District of Pennsylvania in *Unisys Corp. Retiree Medical Benefits ERISA Litigation*, 18 EBC 1257 (E.D. Pa., June 23, 1994), in which the court stated:

> To allow an employer to mislead its employees with constant reference to lifetime benefits when it appears the employer is aware of the confusion seems to me a dangerous and pernicious precedent. (At 1292-3).

The court also noted:

> . . . this court discerns a strong current in the Third Circuit that recognizes that an ERISA fiduciary may not "affirmatively mislead" plan participants. (At 1284).

The affirmative obligation of an employer was also stressed in *Bixler v. Central Pa. Teamsters H. and W. Fund*, 12 F.3d 1292 (3d Cir. 1994). A fiduciary's duty to inform "entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." (At 1300).

The Eighth Circuit joined in the recognition of an employer's fiduciary obligation in *Howe v. Varity Corp.*, (Slip Op. September 29, 1994, 8th Cir.) in which it quoted with approval the opinions of the Sixth Circuit in *Berlin*, the Third Circuit in *Rosen v. Hotel and Restaurant E and B Union*, 637 F.2d 592 (3d Cir. 1980), and the Seventh Circuit in *Peoria Union Stockyards Co. v. Penn Mutual Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir. 1983). "Lying is inconsistent with the loyalty owed by all fiduciaries. . . . "

The above rulings by the Third Circuit in *Fischer*, and by the Sixth Circuit in *Berlin* and *Drennan*, were expressly adopted and followed by the Second Circuit in *Mullins v. Pfizer Inc.*, 23 F.3d 663, 668-669 (2d Cir. 1994).

In *Henglein* I, the Employees offered considerable testimony concerning the oral representations – as well as written – made by the representatives of their employer to the effect that extensive benefits paralleling union-won benefits would be provided to them when, in fact, the employer intended to provide no such benefits upon a shutdown occurrence. In *Henglein* I, II and III, the case was remanded with an affirmative direction to the district court to give weight to such testimony concerning such misrepresentations by the employer's representatives.

The essential point in both the *Fischer* and *Henglein* opinions is that when an employer's representatives speak to employees concerning the benefits they will receive, those representatives must speak truthfully.

We note again that the Third Circuit in *Fischer* stated:

> . . . a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. (At 135).

III. THE RULING THAT ORAL REPRESENTATIONS CONCERNING BENEFITS MAY LEAD TO THE FINDING OF A SEPARATE PLAN, INCORPORATING A DOCUMENT SUCH AS A UNION BENEFIT PLAN, IMPOSES NO BURDENS UPON EMPLOYERS WHO SPEAK HONESTLY AND DISCHARGE THEIR FIDUCIARY OBLIGATIONS.

The Petition repeatedly attacks the Third Circuit rulings in the *Henglein* opinions to the effect that oral representations by knowledgeable and authorized management employees may be evidence of a separate plan. It is thus asserted, at page 16, that: "This approach [that plans may be established 'based solely upon principles of reliance'] would impose upon unwilling employers the burden and obligation of maintaining an ERISA plan in clear contravention of the principles expressed by this court in *Alessi* and *Darden* and create potential corporate liabilities that are incapable of current calculation."

At page 11, it is asserted that under the rulings of the Third Circuit "[t]he plaintiff need only allege that the employer at some time made a representation regarding the provision of an employee benefit to show that an employee benefit exists." It is said, at page 15, that such rulings contravene the fundamental tenet " . . . that ERISA does not require any employer to establish or maintain an employee benefit plan."

But the *Henglein* I opinion made it clear that to credit oral representations as evidence of a plan:

> . . . is entirely consistent with ERISA's dual purpose of protecting the reasonable expectations of plan participants while allowing sponsors the flexibility to structure a plan with an express limitation in writing. To do otherwise would create a loophole inconsistent with ERISA by allowing a plan sponsor to make any

promise regarding benefits without obligation, so long as the promise is not reduced to writing. (A. 498).

Colt had ample reason to believe that the Employees would expect, in the event of a catastrophic event such as the shutdown of an entire plant, that supplementary benefits corresponding to benefits extended to union employees would be provided to them. The 1968 documents announcing the 1968 Informal Plan were never withdrawn. The existence of statements in the Total Income Protection Plan, and in the 1976 Policy and Procedure 74.1, assuring pension benefits consistent with "industry wide practices," together with letters from employees terminated in earlier department shutdowns requesting shutdown benefits – quite apart from its knowledge of the assurances orally communicated to the Employees by its top personnel – were more than sufficient to alert it to the need "to structure a plan with an express limitation in writing" communicating adequate notice of its intent to award to the salaried employees no benefits corresponding to those won by hourly employees. Under these circumstances, Colt, by electing not to issue a plan with an express limitation in writing defining the benefits it would actually provide, or not provide, cannot properly complain that it was being unreasonably burdened.

The argument that the Employees' testimony concerning the oral representations made to them constituted inadmissable hearsay is clearly without merit. The Employees were not testifying that what they were told was the truth. Quite the opposite. They were testifying that, in view of the denial by Colt of a vitally needed benefit, such representations were grossly false and misleading.

The federal courts have consistently accorded significant weight to employees' testimony concerning what their

employer orally represented to them, or what was not disclosed by such representatives. *See, e.g., Monson v. Century Mfg. Co.,* 739 F.2d 1293 (8th Cir. 1984); *Kenney v. Parson Construction Corp.,* Slip Op. D.C. Cir. June 15, 1994; *Eardman v. Bethlehem Steel Corp.,* 607 F.Supp. 196 (W.D.N.Y. 1984); *Bower v. Bunker Hill Co.,* 725 F.2d 1221 (9th Cir. 1984); *Fischer v. Philadelphia Electric Co.,* 994 F.2d 130 (3d Cir. 1993) and *Berlin v. Michigan Bell Tel. Co.,* 858 F.2d 1154 (6th Cir. 1988).

IV. COLT'S ELECTION NOT TO PETITION FOR CERTIORARI IN *HENGLEIN I* MADE THE RULINGS OF THAT CASE – WITH RESPECT TO THE "DISCRETION" AND "LACK OF KNOWLEDGE" DEFENSES, THE IMPORTANCE OF NOTICE AND THE SIGNIFICANCE OF ORAL REPRESENTATIONS – BINDING LAW OF THE CASE AND CAUSED COLT'S SUBSEQUENT APPEALS IN *HENGLEIN II* AND *HENGLEIN III* AS WELL AS THE PENDING PETITION FOR CERTIORARI TO CONSTITUTE VIOLATIONS OF THAT DOCTRINE.

In *Henglein* I, the case was remanded to the district court which "will determine – under the standards and procedures articulated in Parts VI and VIIB of this opinion – whether an informal benefit plan existed in 1982. . . . " (A. 502). *Henglein* II remanded the case to the district court "for further proceedings consistent with this opinion." (A. 41)

In *Bankers Trust Co. v. Bethlehem Steel Corp.,* 761 F.2d 943 (3d Cir. 1985), the court stated:

> It is axiomatic that on remand for further proceedings after decision by an appellate court, the trial court must proceed with the mandate and the law of the case as established on appeal. (citations omitted).
>
> A trial court must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces. (citations omitted).

> "Where the reviewing court in its mandate prescribes that the court shall proceed in accordance with the opinion of the reviewing court, such pronouncement operates to make the opinion a part of the mandate as completely as though the opinion had been set out at length." (At 949). (citations omitted).

The Third Circuit similarly asserted in *DelGrosso v. Spang and Co.*, 903 F.2d 234, 240 (3d Cir. 1990) that:

> When an appellate court directs the district court to act in accordance with the appellate opinion . . . the opinion becomes part of the mandate and must be considered together with it.

Concerning the purpose and application of the Law of the Case Doctrine, Professor Moore states in part as follows:

> Under the doctrine of the law of the case, a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation. . . . Like stare decisis, it serves the dual purpose of: (1) protecting against agitation of settled issues; and (2) assuring the obedience of inferior courts to the decisions of superior court . . . . after the law of the case is determined by a superior court, the inferior court lacks authority to depart from it. . . .
>
> When a case is appealed and remanded, the decision of the appellate court establishes the law of the case, which *must* be followed by the trial court on remand. . . . Vol. 1B, *Moore's Federal Practice*, ¶ 0.404 [1] pp. II-2 to II-6. (emphasis in original).

Professor Moore also noted the significance of an early Supreme Court case in point:

> *See Roberts v. Cooper*, 61 U.S. (20 How.) 467, 481, 15 L. Ed. 969 (1858). There Justice Grier

> observed, "To allow a second writ of error or appeal to a court of last resort on the same question which were open to dispute on the first, would lead to endless litigation. . . . [T]here would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members." (At ¶ 0.404 [1] n. 21).

It is evident, in the very language found throughout Colt's appellate brief in *Henglein* III, that it was quarreling with and challenging the key rulings made by the Third Circuit in both *Henglein* I and *Henglein* II. Thus, Colt's *Henglein* III brief insisted:

> In some instances, this Court's guidance appears to be contradictory or strained – and at odds with the legal authority (both statutory and case law) it purports to follow. For example, under legal authorities cited (but not followed) by this Court, the sponsor's written rescission of the informal plan on December 1, 1972 should be sufficient to conclusively prove the informal plan did not exist in 1982. (At 9, 10).

But the Third Circuit had earlier ruled in *Frank v. Colt Industries Inc.*, 910 F.2d 90 (3d Cir. 1990), that an uncommunicated intent by the creator of a benefit plan to alter that plan could nor effectively modify it. (At 99).

It is thus clear beyond doubt that in *Henglein* III Colt and Mr. Powderly reargued *Henglein* I and *Henglein* II, that Judge Mencer had failed to "implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces," and that Mr. Powderly, instead of respecting the Law of the Case Doctrine and the mandate rule, had chosen to place himself firmly on the side of such gross violations of those rules which are of such critical importance to the effective functioning of the courts and the prompt and just resolution of disputes. The fact that this

litigation is now in its twelfth year is in large part attributable to the conduct of this nature by Mr. Powderly and his indifference to the existence of precedents which conflict with his claimed perception of the law.

As the Third Circuit stated in *Lieb v. Topstone Industries Inc.*, 788 F.2d 151 (3d Cir. 1986):

> Rule 11 contains another material change in its statement that the "court . . . shall impose . . . an appropriate sanction." The use of "shall" was deliberate and carefully considered, and was intended to overcome the reluctance of courts to assess sanctions against erring counsel and parties. *See* Kassan, *An Empirical Study of Rule 11 Sanction*, (Federal Judicial Center 1985).
>
> . . . the conduct of an experienced lawyer or of a lawyer who acted in bad faith is more apt to invite assessment of a substantial penalty than that of a less experienced or merely negligent one. (At 157, 158).

Colt should not again be allowed to violate the Law of the Case doctrine by rearguing before the Supreme Court the issues long since resolved in *Henglein* I.

V. THE DECISION IN *HENGLEIN III* IS NOT A FINAL APPEALABLE ORDER.

A final judgment "must be a judgment in the sense that it is a decision on a cognizable claim for relief." *Curtis Wright v. General Electric Co.*, 446 U.S. 1, 64 L.Ed.2d 1 (1980).

"A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S 229, 233, 65 S.Ct. 631, 633 (1945).

"The final judgment in the case should be complete and self-contained . . . It must set forth the relief to which the prevailing party is entitled or the fact that the plaintiff has been denied all relief." *Reytblatt v. Denton*, 812 F.2d 1041, 1042 (7th Cir. 1987).

Professor Moore has stated that: " . . . the final judgment has been defined as the order that ends the litigation." (Vol. 6, *Moore's Federal Practice*, ¶ 54.02, p. 54-22.3).

Henglein III in no way "ended the litigation." It provided no ruling on "a cognizable claim for relief." Instead, the Third Circuit returned the case to the district court with directions that it apply the *Dillingham* criteria to determine whether employee benefit entities had come into being.

Colt's Petition argues that the Third Circuit's approach "would impose upon unwilling employers the burdens and obligations of maintaining an ERISA plan, in clear contravention of the principles expressed by this court in *Alessi* and *Darden*, and creates potential corporate liabilities that are incapable of current calculation." (At 16). But, in a submittal to the district court dated February 21, 1995, Colt takes the contrary position – that *Henglein* III required the district court to conclude that it lacks jurisdiction and that it must therefore dismiss the Employees' complaint.

Colt thus stated: "Accordingly, because the Plaintiffs have yet to establish the existence of an ERISA plan, Plaintiffs' case should be dismissed under Rule 52(c)." (At 3).

It is clear that *Henglein* III is not a final decision and is therefore not appealable.

CONCLUSION

The Petition for writ of *certiorari* should be denied.

Respectfully submitted,

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